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No. 82-485

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KATHY KEETON,

Petitioner,

—against—

HUSTLER MAGAZINE, INC., LARRY FLYNT, LFP, INC., and L.F.P., INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF CBS INC., DOW JONES & COMPANY, INC., THE HEARST CORPORATION, THE MAGAZINE PUBLISHERS ASSOCIATION, THE MIAMI HERALD PUBLISHING COMPANY, NEWSWEEK, INC., THE NEW YORK TIMES COMPANY, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SIGMA DELTA CHI, TIME, INC. and TRIBUNE COMPANY

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1. Pursuant to Rule 36.3 and Rule 42 of the Rules of this Court, CBS Inc., Dow Jones & Company, Inc., The Hearst Corporation, The Magazine Publishers Association, The Miami Herald Publishing Company, Newsweek, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press, Sigma Delta Chi, Time, Inc., and Tribune

Company respectfully move this Court for leave to file a brief *amicus curiae* in the above-captioned case.

2. Movants include publishers of major newspapers and magazines, and owners of major radio and television networks, involved in communication of news, information, and opinion to the American public. Each of the movants is more fully described in Appendix A annexed hereto.

3. The question presented in this case is a matter of continuing and critical importance to movants. Because their publications circulate throughout the country, movants will be directly affected by this Court's resolution of the question of personal jurisdiction now before it.

4. For the reasons stated above, as well as those set forth in the attached brief *amicus curiae*, movants respectfully request this opportunity to present their views on the instant case to this Court and respectfully request this Court to grant their motion for leave to file the accompanying brief *amicus curiae* urging affirmance of the opinion of the court below.

Dated: New York, New York
June 27, 1983

Respectfully submitted,

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This brief, *amicus curiae*, is respectfully submitted pursuant to Rule 36 of the Rules of this Court, urging affirmance of the decision below of the United States Court of Appeals for the First Circuit, on the ground that personal jurisdiction may not be asserted over the out-of-state defendants consistent with the Due Process clause of the Fourteenth Amendment to the United States Constitution.

INTEREST OF AMICI

Amici include publishers of major newspapers and magazines, and owners of major radio and television stations, involved in communication of news, information and opinion to the American public.[1] Some of their publications are national; some are distributed primarily—but not exclusively—in one metropolitan area. In all cases, their circulation goes beyond the borders of any one state. Some of their publications have circulations in the millions of copies; some in the thousands. As major publishers involved in the dissemination of news and opinions, *amici* play an important role in informing the American people on matters vital to their well-being and self-government.

Because their publications circulate throughout the country, *amici* will be directly affected by this Court's resolution of the question of personal jurisdiction now before it. The jurisdictional rule that petitioner proposes to this Court would expose *amici* to suit in every state in which they enjoy anything more than *de minimis* circulation, even though the state may have little or no connection with the plaintiff's cause of action. Such a rule would enable libel plaintiffs to shop for the forum with rules of law and procedure and with local biases most favorable to them, and thus use jurisdictional gamesmanship to gain an unjustified advantage over publisher defendants.

Amici urge that allowing jurisdiction based on circulation alone—in the absence of a more concrete connection between the forum, the defendant and the controversy—would unreasonably and unfairly burden their ability to conduct their businesses, thereby frustrating fundamental social policies of

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1 *Amici* include CBS Inc., Dow Jones & Company, Inc., The Hearst Corporation, The Magazine Publishers Association, The Miami Herald Publishing Company, Newsweek, Inc., The New York Times Company, The Reporters Committee for Freedom of the Press, Sigma Delta Chi, Time, Inc., and Tribune Company. Each of the *amici* is more fully described in Appendix A to this brief.

states more directly interested in *amici* and the controversies in which they may become involved. *Amici* therefore respectfully submit this brief to urge this Court to repudiate any suggestion that long-arm jurisdiction can be premised on nothing more than circulation of an allegedly libelous publication in a forum.

SUMMARY OF ARGUMENT

The "minimum contacts" test set forth in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and its progeny calls for the weighing of various factors to determine whether a state's assertion of jurisdictional power would be both fair to an out-of-state defendant and consistent with concepts of shared state sovereignty embodied in our federal system. Because of the variables to be considered, as well as the inevitable diversity of the factual settings in which they must be applied, this inquiry is one "in which few answers will be written 'in black and white.' " *Kulko* v. *Superior Court of California*, 436 U.S. 84, 92 (1978) (quoting *Estin* v. *Estin*, 334 U.S. 541, 545 [1948]).

Although the contours of long-arm jurisdiction are usually not susceptible of clear delineation, the case at bar presents this Court with a unique occasion to address, and repudiate, a theory of jurisdiction that falls well beyond the pale. Petitioner claims that, despite the complete absence of any other connection between the defendants' in-state activities and her cause of action and between the forum and the cause of action, the in-state circulation alone of the allegedly defamatory publication is a sufficient basis for New Hampshire to exercise its long-arm jurisdiction. When " 'traditional notions of fair play and substantial justice,' " *International Shoe, supra*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 [1940]), are applied to the particular tort of defamation, with its unusual capacity for causing injury diffused among the fifty states, and when those values are considered "in the context of our federal system of government," *International Shoe, supra*,

326 U.S. at 317, petitioner's claim to jurisdiction emerges as a clear affront to Due Process.[2]

In a state whose only tie to the cause of action is in-state circulation—a state where neither the plaintiff nor the defendant resides and where the plaintiff is largely unknown—the local circulation of the defendant's publication will have only a minimal, often pretextual, connection with plaintiff's cause of action. In such a state, the forum will have nothing more than an undifferentiated and insubstantial interest in adjudicating the controversy. Because of its tenuous relationship to the controversy, application of the forum's choice of law principles, procedural rules and community standards will not fairly be entitled to deference by other states with a greater and more direct interest in the action. Moreover, because the plaintiff will be largely unknown in the forum, the publisher could not reasonably have anticipated that the publication, if libelous, would cause any particularized harm to plaintiff's reputation in the state and so conformed the publication to the standards of the state.

Repudiation of petitioner's theory would work no hardship upon libel plaintiffs. Provided that minimum contacts standards are otherwise satisfied, a libel plaintiff would have ample opportunity to invoke long-arm jurisdiction in a state with a legitimate interest in the cause of action, typically the plaintiff's state of residence.[3] But when a libel plaintiff travels to an essentially uninterested state to sue a publisher based on nothing more than the defendant's circulation in that state and the plaintiff's desire to achieve some tactical advantage, Due Process protects the publisher from being subjected to long-arm jurisdiction.

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2 Since in-state circulation is the only contact asserted in the case at bar as a basis for long-arm jurisdiction, *amici* do not address in this brief the question of what impact other contacts within a forum, such as local newsgathering activities, might have on a jurisdictional analysis.

3 In all cases, of course, the plaintiff will also have the option of suit in those states where the publisher's presence is such that resort to long-arm jurisdiction is unnecessary.

ARGUMENT

IN DEFAMATION ACTIONS, WHERE THE ONLY CONTACT BETWEEN THE DEFENDANT, THE CAUSE OF ACTION AND THE FORUM IS IN-STATE CIRCULATION, DUE PROCESS BARS THE ASSERTION OF LONG-ARM JURISDICTION

This Court has applied the Due Process requirements initially established in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), in a variety of factual settings. For the first time in this case, it is called upon to do so in a defamation action.

The basic analytic structure is well established. Due Process requires that an exercise of jurisdiction over an out-of-state defendant be fair, reasonable and consistent with the forum state's status as a co-equal sovereign in our federal system. *World-Wide Volkswagen* v. *Woodson*, 444 U.S. 286, 292 (1980). Essential to an application of the *International Shoe* standard is a determination whether the connection between the foreign forum, the defendant's in-state activities and the particular cause of action is sufficient to make it fair and reasonable to require the defendant to defend the particular cause of action in the forum state. *Rush* v. *Savchuk*, 444 U.S. 320 (1980); *Kulko* v. *Superior Court of California*, 436 U.S. 84 (1978).

Due Process also requires consideration of a variety of equitable factors in evaluating the propriety of haling an out-of-state defendant into a remote court:

> "[T]he burden on the defendant . . .; the forum State's interest in adjudicating the dispute . . .; the plaintiff's interest in obtaining convenient and effective relief . . .; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental social policies . . . ."

World-Wide Volkswagen v. *Woodson, supra*, 444 U.S. at 292.

The proposition advanced by petitioner in support of her claim of jurisdiction may be succinctly stated: To establish long-arm jurisdiction in a libel action the *only* connection between the forum, the defendant and the cause of action that a libel plaintiff need show is circulation of the defendant's allegedly libelous publication in the forum state. In the context of a suit against a nationally circulated publication, this contention translates into the assertion that whatever the locus of the plaintiff, the defendant and the claimed injury, all fifty states (and the District of Columbia) may exercise long-arm jurisdiction for all alleged libels and that libel plaintiffs—no matter where they and their reputations may be—have an unfettered choice as to where they may bring suit.

Petitioner is relegated to this sweeping argument in the case at bar by the total absence of contacts, other than circulation of defendants' publication, between defendants, petitioner's cause of action and her chosen forum, New Hampshire. In the District Court she failed completely to point to *any* activity by defendants, other than circulation, in the forum.[4] She was also unable to demonstrate that she had *any* reputation in the forum that could possibly have been injured by circulation there of the alleged libel.

Indeed, the District Court, after noting that petitioner, as the plaintiff below, had the burden of alleging and proving facts to support personal jurisdiction, *see McNutt* v. *General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), found that her only claim to any reputation in New Hampshire was the inclusion of her name in a "litany of unknowns" on the masthead of a magazine circulated in the state. In the absence of anything else to suggest that petitioner had any reputation in New Hampshire, the District Court expressly found that she had failed to set forth "any factors which make her anything other than a stranger to the state . . ." and concluded that she

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4 And even that circulation is less than one percent of Hustler's national circulation. Joint Appendix at 43a.

had no "reputation or image of any kind in New Hampshire." Appendix to Petition for Certiorari at 7a.[5]

Petitioner's claim to jurisdiction distorts Due Process standards by avoiding what *International Shoe* requires, namely, an evaluation of the relationship between the plaintiff's cause of action and the defendant's in-state contacts and an assessment of the nexus between the claim and the forum state. It likewise ignores a proper balancing of the other relevant factors outlined in *World-Wide Volkswagen*. Established Due Process analysis leads to the conclusion that, as a matter of fundamental fairness, circulation *alone* does not provide a sufficient basis for long-arm jurisdiction.

A. Circulation Alone Does Not Provide a Sufficient Connection Between the Cause of Action and the Defendant's In-State Activities to Support Long-arm Jurisdiction

Consideration of the connection between the nature and quantity of a defendant's in-state activities and the plaintiff's cause of action is a vital part of the Due Process calculus required by *International Shoe's* "minimum contacts" analysis. *See World-Wide Volkswagen, supra*, 444 U.S. at 295. Absent in-state activities by the defendant that are truly pervasive, Due Process generally allows a non-resident defendant to be called upon to defend in the forum only those claims that arise from the defendant's in-state activities. *See* Von Mehren

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5 Although the Court of Appeals did not quote the District Court's language in its own statement of the facts, 682 F.2d at 33-34, and in fact assumed for purposes of its discussion that petitioner had a *de minimis* in-state reputation, the District Court's factual findings were not questioned—let alone overturned—by the Court of Appeals, and their propriety is not in issue here. These circumstances, and the importance in this case of petitioner's absence of local reputation, makes this case a particularly appropriate one for application of "the salutary principle that great weight should be accorded findings made by district courts in cases turning on peculiarly local conditions and circumstances." *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 621 n.20 (1974).

and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121 (1966). As this Court observed in *International Shoe*:

> "[S]o far as th[e] obligations [sued on] arise out of or are connected with the [defendant's] activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue."

326 U.S. at 319.

Thus, where a libel plaintiff sues in his or her home state and attempts to premise long-arm jurisdiction on the defendant publisher's circulation in that state, there will generally be a strong connection between the defendant's in-state activities—circulation—and the plaintiff's cause of action—a claim for redress for injuries allegedly arising from that circulation. The plaintiff must, of course, seek in that one action recovery for damages suffered in *all* states,[6] but the principal damage to

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6 This is because of the so-called single publication rule. *See, e.g., Patch* v. *Playboy Enterprises, Inc.*, 652 F.2d 754, 757 (8th Cir. 1981). The single publication rule evolved to replace the ancient multiple publication rule, under which each delivery of each copy of printed matter constituted a separate tort, and accordingly gave rise to a separate cause of action. *Duke of Brunswick* v. *Harmer*, 117 Eng. Rep. 75 (Q.B. 1849); *see generally*, Prosser, *Interstate Publication*, 51 Mich. L. Rev. 959 (1953).

The multiplicity of possible actions under the multiple publication rule has long been seen, in most jurisdictions, as an offense to judicial administration and an undue burden on libel defendants. Most pointedly, its effect was to resurrect causes of action for even very old utterances whenever by happenstance a copy changed hands—thus effectively depriving publishers of all benefits of statutes of limitations. *Gregoire* v. *G.P. Putnam & Sons*, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948). The single publication rule now used by a majority of states holds instead that dissemination of all copies of a single writing, such as an issue of a book or newspaper, constitutes a single publication and gives rise to but one cause of action. Restatement (Second) Torts § 577A(3), (4) (1977); Uniform Single Publication Act, § 2.

reputation will usually have been caused in the state in which the suit is being pressed, where the plaintiff will be most intimately known.[7] So long as *International Shoe's* "minimum contacts" standard is met,[8] Due Process generally is not offended when the publisher is forced to defend its publication in the plaintiff's home state.

The situation is different, however, when a libel plaintiff seeks to sue a publisher defendant in a state that is foreign to both plaintiff and defendant and where the plaintiff has no substantial reputation. In such a case, the alleged injury caused by the circulation in the forum state will have at most a minimal relation to the greater harm caused by circulation in other states where the plaintiff is better known. The plaintiff will thus seek to rely on an insubstantial in-state injury as the ostensible basis for jurisdiction, while simultaneously seeking damages principally for harm caused elsewhere.

The case at bar presents an egregious example of a plaintiff's reliance on an alleged *de minimis* in-state injury as the basis for claiming jurisdiction over a far larger out-of-state claim of injury. In light of the District Court's unchallenged findings that petitioner is "a stranger" to New Hampshire and has no "reputation or image of any kind" in the state, Appendix to Petition for Certiorari at 7a, it can hardly be argued that the New Hampshire circulation of defendants' magazine was a cause of any significant portion of the $40 million that peti-

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7 As the Restatement (Second) of Conflicts recognizes, "the state where the plaintiff has suffered the greatest injury by reason of his loss of reputation . . . will usually be the state of the plaintiff's domicile. . . ." Restatement (Second) Conflict of Laws, § 150, Comment e, p. 459 (1971).

8 *Cf. McCabe* v. *Kevin Jenkins & Associates, Inc.*, 531 F. Supp. 648 (E.D. Pa. 1982) (circulation of California-based publication to six subscribers in Pennsylvania held to be an insufficient basis for asserting long-arm jurisdiction in libel action by Pennsylvania residents).

tioner seeks for alleged damage to her reputation where she is actually known. Rather, the circulation in New Hampshire upon which petitioner relies is essentially irrelevant to petitioner's claim. It is a jurisdictional pretext.

B. Circulation Alone Does Not Provide a Sufficient Connection Between the Cause of Action and the Forum State to Support Long-Arm Jurisdiction

When a libel plaintiff relies only on in-state circulation of a publication to connect his or her claim to the forum, not only is there an insufficient connection between the defendant's in-state activities and the cause of action, but the nexus between the forum and the lawsuit is also too insignificant to support long-arm jurisdiction. If an allegedly libelous publication is circulated in 50 states, the mere fact that the plaintiff has elected to bring suit in one of them provides no reason why the defendant should be compelled to travel to that particular state to defend the action and in no meaningful way distinguishes the forum from any other state. At the same time, such a forum has no legitimate interest in adjudicating a dispute between an out-of-state plaintiff and an out-of-state defendant over an alleged libel that principally—or entirely—caused injury elsewhere.

As this Court emphasized in *Rush* v. *Savchuk, supra,* "[i]t is apparent that such a 'contact' "—that is, one diffused throughout all American jurisdictions—"can have no jurisdictional significance." 444 U.S. at 330. Petitioner in the case at bar has shown nothing more than such a diffused connection between the forum and her claim. She has provided no reason why New Hampshire, any more than Alaska, Arizona or Arkansas, is an appropriate forum for her case.

In fact, New Hampshire has no interest in this controversy. A state has a legitimate interest, of course, in providing a forum for its residents. A state's "manifest interest in providing effective means of redress for its residents . . ." may be the pivotal factor in assessing the propriety of jurisdiction.

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957).[9] For this reason, the lower court decisions that have upheld personal jurisdiction over non-resident publishers in favor of resident plaintiffs have done so explicitly to permit the litigation to proceed in the most interested forum, convenient for the stay-at-home plaintiff.[10]

Where, as here, a plaintiff chooses to leave his or her home state to sue elsewhere, however, no such state interest is present. To the contrary, in such cases the plaintiff has made the deliberate decision to forego the protections of his or her state's courts and to impose the costs of distant litigation upon him- or herself. In so doing, however, such a plaintiff imposes on the courts and juries of a foreign state the burden of adjudicating a dispute in which that state may have little or no interest.[11]

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9 *See also Roy* v. *North American Newspaper Alliance, Inc.*, 106 N.H. 92, 205 A.2d 844, 845, 847 (1964) (emphasizing New Hampshire's interest in protecting its own citizens from being defamed). *Cf. Kulko* v. *Superior Court of California*, 436 U.S. 84, 92 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186, 208 (1977).

10 *E.g., Anselmi* v. *Denver Post*, 552 F.2d 316, 321 (10th Cir.), *cert. denied*, 432 U.S. 911 (1977); *Buckley* v. *New York Post Corp.*, 373 F.2d 175, 180 (2d Cir. 1967). *Compare Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344 (5th Cir. 1966) (holding against personal jurisdiction over a non-resident publisher despite in-state circulation, where the plaintiff was also a non-resident).

11 If plaintiffs could bring libel actions anywhere, the burden of adjudicating extraneous claims could fall with particular force upon states that have rules or statutes favoring libel plaintiffs. Thus, for example, a state that chose to enact a long limitations statute would risk having its courts flooded with claims that had expired elsewhere. A forum state's interest in avoiding added burdens on what may be an already over-crowded judicial system, while still preserving that system's efficacy and favorable rules in cases with a more direct connection to the state and its residents, suggest that states may have a greater interest in avoiding extraneous claims than in adjudicating them. *See Sosna* v. *Iowa*, 419 U.S. 393, 407 (1975). *Cf. Douglas* v. *New York, New Haven, and Hartford Railroad*, 279 U.S. 377, 387 (1929).

Absent a state interest in providing a forum for its residents, a state seeking to assert long-arm jurisdiction over a remote publisher must ground its claim to jurisdiction in the state's interest in the tort itself. "The legitimate state interest" that underlies the law of libel, and that justifies limited intrusion on freedom of expression, is compensation for wrongful injury to reputation. *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). *See New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Although this is a "strong and legitimate interest," *Gertz, supra*, 418 U.S. at 348, it follows that a state has no strong, legitimate or even identifiable interest to vindicate where little or no injury to the reputation of a non-resident has been suffered within its borders and where the principal injury to reputation has occurred elsewhere. *See id.*, 418 U.S. at 349. To the contrary, assertion of state jurisdiction in such a case is little more than "officious intermeddling in matters in which another state has a paramount interest." *Sosna* v. *Iowa*, 419 U.S. 393, 407 (1975).

Since, as the District Court found, petitioner is not a New Hampshire resident and has no claim to reputation in New Hampshire, that state obviously has no interest in protecting petitioner's reputation. But even if, contrary to the District Court's findings, the inclusion of petitioner's name in a laundry list of names on a magazine masthead gave her some local reputation in her chosen forum, the forum's interest, if any, in protecting this tenuous in-state reputation would be shared with every other state and would hardly be sufficient to justify forcing the defendant publisher to defend in New Hampshire.[12]

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12 There is no other legitimate state interest in the law of defamation. In cases involving out-of-state plaintiffs, some courts have posited (and then discounted) a state interest in "protect[ing] its citizens against reading libels . . . about persons not present in th[e] state." *Curtis Publishing Co.* v. *Birdsong*, 360 F.2d 344, 347 (5th Cir. 1966). *See also, Keeton* v. *Hustler Magazine, Inc.*, 682 F.2d at 34; Comment, *Long-Arm Jurisdiction Over Publishers: To Chill A Mocking Word*, 67 Col. L. Rev. 342, 350 (1967). But even hypothesizing such an interest goes too far. The First Amendment places any "interest in

C. Long-Arm Jurisdiction Based Upon Circulation Alone Would Thwart the Shared Interests of the Several States in Furthering Fundamental Substantive Social Policies

A rule allowing jurisdiction based upon mere circulation would allow a relatively uninterested state to override the substantive policies of its sister states. If libel plaintiffs were given free rein to bring suit anywhere, they naturally would be encouraged to bring suit in states where they perceived the procedures, choice of law rules or juries to be particularly favorable to them, even if those states had no relation to their causes of action. *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 250 (1981). For publications with nationwide circulation, the result would be to nationalize the law of those jurisdictions least favorable to the press. A state with only a negligible interest in a controversy could apply an aberrant rule of law and thereby thwart the considered judgments made by the legislatures of states with an immediate concern with the case.

The action at bar amply illustrates these dangers. Although a particular state's statute of limitations is considered a procedural rule, there is a clear consensus among the several states that the statute of limitations for libel should be short. Thus, at last count forty-four states require libel actions to be

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shielding [local] citizens from information about activities outside [a state's] borders" beyond the legitimate reach of state power. *Bigelow* v. *Virginia*, 421 U.S. 809, 827-28 (1975). Moreover, assertion of such an interest would threaten to enmesh a state's courts in the impermissible task of regulating the content of communication without any countervailing concern with protecting the reputation of its subject. *See* L. Tribe, *American Constitutional Law* 641 (1978).

In any event, even assuming that such a state interest were constitutionally cognizable and would not engage the state in impermissible content regulation, such an interest inevitably would be "shared by 49 other states . . ." *Curtis Publishing Co.* v. *Birdsong*, *supra*, 360 F.2d at 347, and could thus provide no reason why jurisdiction in any such uninterested state would be appropriate. *See Rush* v. *Savchuk*, *supra*, 444 U.S. at 330.

brought within one or two years after publication. *See* R. Sack, *Libel, Slander, and Related Problems*, 587 (1980). The predominance of short limitations statutes for libel is a "declaration of [a] public policy governing the right to litigate," *Gregoire* v. *G.P. Putnam & Sons*, 298 N.Y. 119, 125, 81 N.E.2d 45, 48 (1948), that is generally shared by the several states. It reflects their judgment that a potential plaintiff can promptly assess any damage to reputation and their deliberate decision that publishers should be protected from having to defend stale claims. *Id.*, 298 N.Y. at 125-26, 81 N.E.2d at 48-49. When the instant action was begun, New Hampshire was the most conspicuous exception to this consensus. It provided for a six-year statute of limitations.

Petitioner, a New York resident who claims to have been libeled by an Ohio-based publication, waited until after the one-year statutes of limitations applicable in her home state and the defendants' had expired before bringing this action in New Hampshire. She did so because she concluded that New Hampshire was "the only state remaining [in the country] in which the statute of limitations had not run." 682 F.2d at 33. Because New Hampshire courts apparently apply their own state's six-year statute of limitations to all actions commenced in the forum, *id.* at 35, the likely result—if long-arm jurisdiction is upheld—would be that petitioner's claim for damages to her reputation nationwide, which had expired everywhere else, would be revived by the simple mechanism of commencement of suit there.

Obviously, if petitioner's assertion of long-arm jurisdiction were countenanced by this Court, all other similarly stale claims against national publications could be resurrected by the same simple expedient. The practical effect of such a jurisdictional rule would be to obliterate for such publications the statutes of limitations enacted by forty-nine other states and to substitute in their place, as a new "national" limitations statute, the law of that one state whose legislature had decided to enact the longest libel limitations statute.

The results of petitioner's approach would not be limited to nationalizing the statute of limitations for libel. Rather, its forum-shopping opportunities could be multiplied endlessly. Of course, procedural rules, such as statutes of limitations, reporter's shield laws, evidentiary presumptions and rules for jury composition and voting, will ordinarily be those of the forum. Restatement (Second) Conflict of Laws, § 150 (1971). But even as to substantive rules, a suit in a remote jurisdiction dramatically increases the likelihood that the law of that uninterested forum will be applied. New Hampshire, for example, leaves its courts free to apply its own law if they "regard[ ] [it] as the sounder rule of law." *La Bounty* v. *American Insurance Co.*, 451 A.2d 161, 163 (N.H. 1982). Moreover, the already "malleable choice-of-law rules," *Piper Aircraft* v. *Reyno, supra,* 454 U.S. at 252 n. 18, of the fifty states are particularly variable in multi-state defamation actions.[13] And if a *de minimis* in-state injury is held to create a sufficient state interest for the assertion of long-arm jurisdiction, a state could as readily hold the same injury a sufficient basis for application of its own substantive law.[14] *See Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 312-13 (1981).

Even where libel law has been "constitutionalized," there may be powerful motivations for a plaintiff to go forum

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13 As discussed in Note, *Choice of Law in Multistate Defamation Actions: A Functional Approach,* 77 Harv. L. Rev. 1463 (1965), the problem of choice-of-law in the multi-state defamation context has produced more confusion than clarity, engendering "diverse judicial responses," *id.* at 1463, that include, *inter alia,* the application of the law of (1) each state in which an alleged libel is circulated, (2) the state of principal publication, (3) the state of first publication, (4) the plaintiff's domicile, (5) the state with most significant contacts to the action, (6) the state with greatest interest in the particular issue, or (7) simply of the forum itself.

14 Constitutional limitations on a state's choice of law are so lenient as to afford no sure protection against such results where based on the defendant publisher's in-state circulation. *Allstate Insurance Co.* v. *Hague,* 449 U.S. 302, 312-13 (plurality), 332 (dissent) (1981).

shopping. For example, the several federal circuits now have divergent decisional law on such vital libel elements as the definition of a "public figure"[15] and the availability of the defense of "neutral reportage."[16] Because each federal district court will inevitably follow the law of its circuit on such issues, *e.g.*, *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 63 (1982); *see Long* v. *Arcell*, 618 F.2d 1145, 1147 n.2 (5th Cir.), *cert. denied*, 449 U.S. 1083 (1981), the plaintiff would again have an opportunity to select the controlling law.[17]

Finally, petitioner's approach would allow plaintiffs to seek out favorable juries for even dubious claims in states distant from the place of injury to the plaintiff's reputation. Although the essence of the tort of defamation is the damage to one's reputation perceived "by the reading public acquainted with the parties and the subject matter," *November* v. *Time, Inc.*, 13 N.Y.2d 175, 179, 19 N.E.2d 126, 244 N.Y.S.2d 309, 312

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15 *Compare, e.g., Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d 264, 274 (3d Cir. 1980) (factual showing of plaintiff's "access to channels of effective communication" is an important consideration in finding it to be public figure), *with Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 589 (1st Cir. 1980) (plaintiff's access to channels of effective communication discounted in public figure inquiry).

16 *Compare Edwards* v. *National Audubon Society*, 556 F.2d 113, 120 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977), *with Dickey* v. *CBS, Inc.*, 583 F.2d 1221, 1225-26 (3d Cir. 1978) *and Dixson* v. *Newsweek*, 562 F.2d 626, 630-31 (10th Cir. 1977).

17 The circuits may also disagree on their construction of a particular state's substantive law. *Compare, Medico* v. *Time, Inc.*, 643 F.2d 134, 146-47 (3d Cir.), *cert. denied*, 454 U.S. 836 (1981) (Pennsylvania law affords privilege to report fairly on official action or proceeding irrespective of whether the reporter actually relied on the official action or proceeding as his source of information), *with Bufalino* v. *Associated Press*, 692 F.2d 266 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3872 (June 6, 1983) (Pennsylvania law confers such a privilege only if the reporter actually derived his information from the official action or proceeding).

(1963), petitioner's rule would allow such decisions to be made by juries familiar with neither. A jury in another part of the country might well consider the defamatory nature of, and damages attributable to, an alleged libel differently from a jury in the community in which a plaintiff resides, and in which harm to his or her reputation could be localized.

Varying local standards and divergence in procedural and substantive rules among the states and federal circuits may, of course, be salutary. *See, e.g., Chandler* v. *Florida,* 449 U.S. 560, 579-80 (1981). But the benefits of the "laboratories" of the many jurisdictions in our federal system are negated by the unlimited forum-shopping opportunities advocated by petitioner here. Under petitioner's approach, there is simply no assurance that divergent local rules will be confined in application to those defamation actions in which the forum has any legitimate interest.

This result would place an undue strain on the federal system. An adverse judgment in New Hampshire is of concern to the defendant publisher here not because its in-state assets can be seized. It has none. Rather, the defendant's potential liability exists because the judgment of a court held to have jurisdiction is constitutionally entitled to Full Faith and Credit elsewhere. *E.g., Nevada* v. *Hall,* 440 U.S. 410, 421 (1979). For this reason, jurisdictional standards must be sufficiently stringent to guarantee that each state laying a claim upon an out-of-state defendant has a legitimate interest in the cause of action, so that its judgment is fairly entitled to deference by the necessarily interested states where the defendant's assets can be found. *See Thomas* v. *Washington Gas Light Co.,* 448 U.S. 261, 272 (1980); *Nevada* v. *Hall, supra,* 440 U.S. at 424 n.24 (1979).

A jurisdictional rule that would allow a state that is essentially uninterested in an action to override the considered judgments of forty-nine other states—in this case that a publisher after a given time is entitled to repose—would feature no such legitimacy. Rather, it would defeat "the shared

interest of the several states in furthering fundamental substantive social policies. . . ." *World-Wide Volkswagen, supra,* 444 U.S. at 292. *See Allstate Insurance Co.* v. *Hague, supra,* 449 U.S. at 308; *Nevada* v. *Hall, supra,* 440 U.S. at 424 n.24. Such a rule would violate the policies implicit in Full Faith and Credit and overstep the limitations on state sovereignty that our federal system imposes on each state in the interests of all.

D. Long-Arm Jurisdiction Based Upon Circulation Alone is Improper in States in Which a Particularized Risk of Injury to Reputation Is Not Reasonably Foreseeable

While the foreseeability of suit in a given forum has played an important part in judicial application of Due Process standards, the foreseeability that is "critical to due process analysis," as this Court emphasized in *World-Wide Volkswagen,* "is not the mere likelihood that a [defendant's] product will find its way into the forum State." 444 U.S. at 297. Instead, it is "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Ibid.*

Underlying petitioner's "circulation-is-sufficient" argument is an implicit suggestion that this Court should transplant to the libel context an approach to foreseeability developed in products liability cases, which allows suit in states into which a manufacturer has directly or indirectly shipped his allegedly defective product. But such an approach is manifestly inapplicable to defamation actions.

In the context of allegedly defective products, a manufacturer who injects his goods into the stream of commerce cannot foresee whom the product might injure if defective. Nor does the product's capacity to injure generally depend on where it is used. Rather, the foreseeable places of injury are coextensive with the places in which the goods are distributed. *See Buckeye Boiler Co.* v. *Superior Court of Los Angeles County,* 71 Cal.2d 893, 80 Cal. Rptr. 113 (1969). In such circumstances, the courts have responded by frequently sustaining jurisdiction over manufacturers based upon in-state

injury in states where they deliberately distribute their products, directly or indirectly. *See, e.g., Buckeye Boiler, supra; Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961). *Cf. World-Wide Volkswagen, supra,* 444 U.S. at 295-98.

This reasoning, however, does not carry over to a libel context. The tort of defamation provides redress for injury, not to unidentifiable consumers, but to the subjects of a publication, who ordinarily will be known to the publisher in advance of publication. If the publisher is aware who the subjects of the publication are, he or she reasonably can anticipate where those subjects may be injured if the publication proves to be false and defamatory. Thus, in contrast to products liability cases, the mere fact of deliberate circulation in a state is not the best measure of whether particularized harm to reputation may foreseeably occur there. Instead, if a publication is capable of causing injury to reputation, it is foreseeable that such injury will be particularized in the home state of the subject of the publication or, at most, in those places where he or she is well known. And it follows that only in those states should a publisher be called to account for that injury.[18]

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18 This focus, for purposes of jurisdiction, on where a publication foreseeably could cause injury is consistent with that adopted by at least three circuit courts of appeal. *See e.g., Church of Scientology* v. *Adams,* 584 F.2d 893, 897-98 (9th Cir. 1978) (holding that jurisdiction was not proper in California where "it was not reasonably foreseeable that any substantial risk of defamation would arise from [the] circulation [of the publications at issue] in that state. . . ."); *Anselmi* v. *Denver Post, Inc.*, 552 F.2d 317, 325 (10th Cir.), *cert. denied,* 432 U.S. 911 (1977) (allowing jurisdiction in Wyoming over a California publisher in action brought by Wyoming residents where "it was foreseeable that [the story] would be given substantial attention within Wyoming" and would have a "substantial effect" there); *Appleyard* v. *Transamerican Press, Inc.*, 539 F.2d 1026, 1029 (4th Cir. 1976), *cert. denied,* 429 U.S. 1041 (1977) (allowing jurisdiction in North Carolina where "the articles in issue were directed at a North Carolina resident, and any damage which those articles caused could reasonably be expected to occur in North Carolina."). *See also, Rusack* v. *Harsha,* 470 F.Supp. 285, 291 (M.D. Pa. 1978); *McGuire* v. *Brightman*, 79 Cal. App. 3d 776, 145 Cal. Rptr. 256 (1st Dist. 1978).

Barring a state from asserting long-arm jurisdiction based on mere circulation unless the plaintiff has at least a substantial in-state reputation allows publishers some assurance about where they might and might not be liable to suit. This measure of predictability would enable them to structure their primary conduct with a view towards its foreseeable consequences, *World-Wide Volkswagen, supra*, 444 U.S. at 297, and would thus contribute to the "orderly administration of the laws." *International Shoe, supra*, 326 U.S. at 319.

In contrast, under petitioner's proposed rule—allowing jurisdiction in *any* state where a publication is circulated—publishers would be left guessing where suit might result. They would be forced to conform their standards of reporting, writing and editing to those of the state whose laws were most restrictive, thus limiting the free flow of ideas and information in those states whose public policy accords publishers more breathing room. And they could avoid suit in any particular state only by completely discontinuing circulation there.[19]

Predictability is particularly important where First Amendment rights are at stake. *See Smith* v. *Goguen*, 415 U.S. 566, 573 (1974) (the Due Process vagueness doctrine "demands a greater degree of specificity" where First Amendment rights are concerned than in other contexts). Where the possibility of litigation could inhibit the exercise of First Amendment

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19 *See New York Times Co.* v. *Connor*, 365 F.2d 567, 572 (5th Cir. 1966) *cert. denied*, 432 U.S. 911 (1967):

> "In the face of this very real risk [that a local jury in a distant state might be incensed by an out-of-state publication], could a publisher justify distribution of his product in any state where the size of his circulation does not balance the danger of this liability? Certainly, a mere 395 issues per day as involved in the instant case would not be sufficient. As a result, those people in the State of Alabama who wish to read a publication such as the New York Times would be deprived of this opportunity."

rights,[20] it is vital that publishers be able to assess with as much clarity as possible in which forum and under what laws that consequence is likely to result. Publishers would be deprived of that ability under any standard that would allow suit virtually anywhere. Such a standard could disproportionately discourage the exercise of First Amendment rights by broadly inhibiting both circulation and content, not only in states where suit ultimately would be brought, but even in places where the risks to be avoided would not in fact be realized. *Cf. Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964).

No countervailing interest justifies such a broad chill upon speech. To the contrary, libel plaintiffs have more than adequate opportunities to seek "convenient and effective relief . . ." *World-Wide Volkswagen, supra*, 444 U.S. at 292, in states with a more substantial connection with the controversy, where their own ties and convenience generally would be greatest or where the defendant is truly present. There is no substantial reason for also granting to plaintiffs the right to sue in jurisdictions with no significant connection with, or interest in, their claim.

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20 As this Court observed in *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938), the First Amendment protects the right to circulate as surely as it does the content of speech itself:

> " 'Liberty of circulating is as essential to that freedom as liberty of publishing: indeed, without the circulation, the publication would be of little value.' *Ex parte Jackson*, 96 U.S. 727, 733."

CONCLUSION

For the reasons stated above, *amici* respectfully urge this Court to affirm the decision below, and to hold that in-state circulation of an allegedly defamatory publication is not, by itself, sufficient to establish long-arm jurisdiction.

Respectfully submitted,

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